In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1951

CLARENCE OLIN "HEAD" REVEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted on one count charging substantive violations of 18 U.S.C. 1955 (conducting, financing, managing, directing or owning all or part of an illegal gambling business) and one count of conspiracy to violate the same statute. He was given a general sentence of four years' imprisonment, subject to the early parole eligibility provisions of 18 U.S.C. 4208 (a)(2). The court of appeals affirmed (Pet. App. A, pp. 1a-5a; 493 F.2d 1).

The government's evidence showed that in the Fall of 1971, a mobile trailer located in Columbus, Georgia, was placed under surveillance by local authorities because it was suspected of being the center of a foot-

ball gambling operation (Tr. 18–19). Further investigation revealed that the operation received "line" information with respect to upcoming football contests through telephone contacts in Las Vegas, Nevada (Tr. 310–320).[1] These telephone calls from Nevada were placed to certain numbers in both Columbus, Georgia, and Phoenix City, Alabama. The mobile trailer in Columbus was used primarily to collect money and to tally up parlay sheets, which were distributed in both Columbus and Phoenix City (Tr. 99–100, 190).

Petitioner's participation in the gambling enterprise was thoroughly demonstrated. Witnesses Benny Knox, Mickey Coy Kite, Richard Wayne Evans, Bobby Joe Lee, Bobby Chesser, and William Chesser, all of whom had participated in the gambling business, each testified that petitioner was frequently present in the trailer when the parlay sheets were being tallied up (Tr. 182–183, 194, 215, 234–235, 382, 426–427, 429). William Chesser testified that on one occasion, after the sheets had been tallied, Bobby Smith gave petitioner the money that had been received in connection with the bets, and petitioner left the trailer with the bag of money (Tr. 425–427). Lee indicated that once he had driven to petitioner's home in Phoenix City, Alabama, in order to pick up a quantity of money to be used to pay off winning bets (Tr. 239–242). Lee also stated that on another occasion, when the tally came up short, petitioner ordered those involved

[1] There was testimony that "line" information is "the odds given on a particular football game" (Tr. 312).

to "* * * get in there and straighten that mess out * * *" (Tr. 243). Bobby Chesser testified that when one of the members of the gambling operation had had to use some personal funds to pay off certain winning bets, he stated to others in the group, including petitioner, that "you all owe me so much money. This is my personal money" (Tr. 382).[2]

1. Petitioner argues that "Wharton's Rule" precludes conviction and punishment for a substantive violation of 18 U.S.C. 1955 and for a conspiracy to commit that offense. As petitioner points out, that issue is presented in *Iannelli* v. *United States*, No. 73-64, certiorari granted May 28, 1974. The Court may wish, therefore, to defer disposition of the present petition with respect to this issue until after the decision in *Iannelli*, and then to dispose of it in accordance with that decision.

2. Petitioner contends that because the illegal gambling business he was charged with conducting is de-

[2] Appended to the petition is an affidavit (Pet. App. A, pp. 12a–14a) by one of the government's witnesses, Jerry T. Evans, in which Evans recants portions of his prior trial testimony. However, this matter is not properly before the Court. Petitioner unsuccessfully moved in the district court for a new trial (Pet. App. A, pp. 15a–19a), and the district court's denial of this motion has not yet been resolved by the court of appeals. See *United States* v. *Revel*, No. 74-2776 (C.A. 5). In any event, as our statement of the facts indicates and as the district court found, "the verdict would not have been different even if Evans had not testified. The testimony of other witnesses was strong enough to convince the jury of Revel's guilt with or without Evans' testimony" (Pet. App. A, p. 18a). In compiling our statement of the facts for this memorandum, no reliance was placed on the testimony of Jerry Evans.

fined in Section 1955 as one that violates state law, he was improperly convicted because the Alabama statute of limitations had run upon the state offense that was the basis of the federal charge. We submit, however, that the court of appeals correctly concluded that the reference to state law in Section 1955 is only for the purpose of defining the *conduct* prohibited and was not intended to incorporate the entire state statutory scheme. "The gravamen of the indictment is that [petitioner] violated federal law"; the purpose of the federal statute is to supplement, rather than pre-empt, state gambling laws (Pet. App. A, p. 4a). Reference to state law is necessary only to identify the type of unlawful activity. As the court of appeals stated (*id.* at 5a):

> Certainly Congress could have incorporated state statutes of limitations into the federal statute, but we cannot perceive any indication that it has done so * * * To the contrary, Congress, in passing the 1970 act, emphasized the federal interest in dealing with organized crime because of the influence of organized criminal activities on the economy, security and general welfare of the entire country. Congress excluded local, transitory gambling activities from the scope of the law, leaving their regulation to state and local authorities, but it asserted federal jurisdiction over racketeering and large-scale gambling activities. In view of this bifurcated system of enforcement, it seems reasonable to use federal standards in enforcing the federal law. * * *

The "federal standards" in regard to statutes of limitations are found in 18 U.S.C. 3282, which provides

a five-year statute of limitations for non-capital federal offenses, "[e]xcept as otherwise expressly provided by law." There is no other provision applying to 18 U.S.C. 1955. By analogy, 18 U.S.C. 1952, which prohibits the use of interstate commerce with intent to facilitate an illegal activity and defines illegal activity in part as one that violates state law, has been similarly interpreted as not incorporating local statutes of limitation. See *United States* v. *Cerone*, 452 F.2d 274, 286–287 (C.A. 7), certiorari denied, 405 U.S. 964.

3. Without citation in the record to such comments, petitioner further argues that the United States Attorney made nine improper comments as to petitioner's failure to testify. A review of the United States Attorney's closing arguments (Tr. 515–528), however, reveals that his remarks to the jury were directed only to reminding them that there was no substantial defense evidence to support defense counsel's contention that petitioner's proximity to the gambling activity was due solely to his interest in collegiate athletics. See, *e.g.*, Tr. 525. These comments were directed not to petitioner's failure to testify himself but to the insufficiency of the defense evidence in general to support counsel's theory of defense.

4. Petitioner's final two contentions, concerning the trial court's jury instructions and the sufficiency of the evidence, are equally without merit. It is argued the court's instruction that "* * * Mr. Revel can have done this by himself * * *" (Pet. 12; Tr. 591) was inaccurate as a matter of law because 18 U.S.C.

1955 requires that the prohibited gambling business involve five or more persons. It is, however, axiomatic that instructions to a jury must be considered as a whole and that a challenge to jury instructions will not succeed if based upon a portion of the charge taken out of context. See, *e.g.*, *Carter* v. *United States*, 427 F. 2d 619, 625 (C.A.D.C.). In the portion of the instruction quoted by petitioner, the trial court was merely distinguishing between the conspiracy count and the substantive count and did not purport to suggest that five persons did not need to be involved before a violation of Section 1955 was established. Indeed, immediately after the instruction referred to, the trial court reiterated that there "must be five or more people involved" (Tr. 592). Moreover, so far as appears from the record, there was no objection in the trial court as required by Rule 30 of the Federal Rules of Criminal Procedure to the portion of the instructions complained of here.

Finally, petitioner argues that it was error for the trial court not to instruct the jury that, in order to support a guilty verdict against petitioner upon the substantive charge, he must be found to have perpetrated some "affirmative act" within the Middle District of Alabama, the district in which the trial occurred.[3] This position is incorrect. Petitioner is deemed to have committed an offense in the Middle District of Alabama if a person whom he aided and abetted had committed an act there, and the trial

[3] Rule 18 of the Federal Rules of Criminal Procedure provides that a prosecution shall be pursued in the district in which the offense was committed.

court gave the traditional aiding and abetting instruction (Tr. 564). Moreover, the evidence adduced at trial revealed that petitioner's participation in the gambling business extended to Phoenix City, Alabama, as well as Columbus, Georgia. See, *e.g.*, Tr. 99–100, 190, 239–242.

It is therefore respectfully suggested that the Court defer disposition of this case until after its decision in *Iannelli*, and that in all other respects the petition should be denied.

ROBERT H. BORK,
Solicitor General.

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